bargaining table knowing that if the United States declines to approve an NGBT agreement, the FCC could, by applying the proposed "critical mass" test, make it difficult, it not impossible, for non-U.S.-licensed MSS operators to serve the United States

To the extent that the FCC takes action that violates the "standstill" commitment that has been made by the United States, the agency would seriously jeopardize the success of the NGBT negotiations. An attempt by the United States (or any other major country) to preempt the outcome of the negotiations by unilateral action to disadvantage telecommunications operators licensed elsewhere would risk provoking similar action by additional countries. The net result of such actions would be to move the telecommunications policy of the WTO member countries in the opposite direction from the broad-based opening of markets sought by the United States (and many like-minded countries) through the NGBT process The United States and other WTO member governments negotiated the standstill provision and committed themselves to it specifically to *avoid* such backsliding in an anticompetitive direction.

The impact of the ECO-Sat test on the NGBT talks is particularly relevant in light of the role that MSS considerations played in the unraveling of the talks immediately prior to the original April 30, 1996 deadline.[35] The United States' dissatisfaction with the quality of various other countries' offers[36] relating to MSS (in the sense of how far these offers provide for the

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[35] *See* Paul Lewis, *Telecommunications Talks Postponed as U.S. Balks*, N.Y. Times, May 1, 1996 at D4; *see also* Frances Williams, Guy de Jonquières, *WTO Close to Deal on Telecoms Liberalization*, Financial Times, Apr. 25, 1996 at 6.

[36] In the context of the NGBT talks, an "offer" is a document put forward by a national delegation to the NGBT in a standard tabular format, which defines the extent to which the government of the country concerned is willing to make commitments concerning market access, including application of the Most Favored Nation principle ("MFN"), National Treatment, and certain additional matters ("Additional Commitments" mainly concerning regulatory arrangements). Such "offers" remain provisional until a final NGBT agreement is reached, whereupon they become legally binding schedules. The detailed mechanics of the process are described in Michael Tyler, William Letwin, and Russel Pipe, *Trade Agreements on Telecommunications: Regulatory Implications [Briefing Report No. 5]*, (Geneva, ITU, Mar. 1996).

effective opening of national markets) has been well publicized. Consequently, the mere proposal of a "critical mass" ECO-Sat requirement may be viewed internationally as an attempt by the United States to coerce countries to improve their MSS offers rather than to continue working toward the same result through a good-faith process of international negotiation. While it is very desirable that as many countries as possible improve their NGBT offers (*i.e.*, include commitments to more far-reaching steps to open their national markets to international competition), violating the standstill provision will not achieve this result.

B. The ECO-Sat Test Contradicts The United States' Own Proposals For Open Market Access In The NGBT

The Commission's ECO-Sat test also contradicts the position advanced by the Executive Branch in the NGBT. The United States' "strategic goal" in the NGBT, as explained by Ambassador Jeffrey Lang before the House Subcommittee on Commerce, Trade and Hazardous Materials, "has been to combine the classic principles of trade negotiations — market access and national treatment — with an emphasis on the need for pro-competitive regulatory principles."[37] In particular, Ambassador Lang explained, during two years of NGBT negotiations, the United States has sought "firm meaningful commitments by the participants in this negotiation to open their markets."[38]

The offer the United States has put on the table in the NGBT talks in pursuit of this objective offers just such commitments. If and when converted into a binding Schedule forming part of a final agreement, this offer would apply the GATS principles of MFN and National

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[37] *Hearings on World Trade Organization (WTO) Basic Telecommunications Services Talks Before the Subcomm. on Commerce, Trade and Hazardous Materials of the House Comm on Commerce*, 104th Cong., 2d Sess. (1996) (statement of Ambassador Jeffrey M. Lang).

[38] *Id.*

Treatment, together with a far-reaching commitment to fair and equitable treatment of non-U.S.-licensed operators in the regulatory process, to a comprehensive range of telecommunications services.

Adoption of the ECO-Sat test would directly contradict the U.S. position in the NGBT calling for open market access. At the same time the U.S. negotiators are demanding the liberalization of markets in every other WTO member country, the FCC is threatening to deny U.S. market access to non-U.S.-licensed MSS operators based on a "critical mass" reciprocity test. While the Commission might believe the ECO-Sat test aids the U.S. position by increasing the Executive Branch's leverage against closed markets, that strategy not only contradicts the standstill agreement, but also runs counter to the United States' long-established and successful practice of promoting liberalization in international telecommunications markets by example.

It is striking that in recent years, more and more countries have followed the example of the United States in this respect, even to the extent of removing barriers to foreign participation in their own markets without insisting on immediate reciprocity. The United Kingdom government, for example, recently decided to allow carriers from other countries to provide international services on a resale basis in the U.K., whether or not their "home countries" do the same.[39] The announcement by the government of Singapore in April 24, 1996 that it would bring forward the date for ending Singapore Telecom's monopoly of basic fixed services from 2007 to 2002 (first made in the context of the WTO/NGBT negotiations), has since been

[39] *See* Statement by Minister for Science and Technology, Press Notice P/96/461, London, Department of Trade and Industry, (June 6, 1996). In making the announcement, Minister Ian Taylor stated that ". . . liberalization in Europe and other major markets reduces the risk of abuse by overseas companies that enjoy a monopoly or are inadequately regulated in their home market." *Id.*

improved upon.[40] The monopoly will now expire in the year 2000, whether or not NGBT reaches agreement, and whether or not other countries adopt similar measures. In this kind of environment, and with such momentum toward the opening of national markets around the world, it would be counterproductive for the United States to undermine its own universally-acknowledged leadership position, as well as abandon its own "standstill" commitment, by implementing the Commission's ECO-Sat proposal.

The FCC's ECO-Sat proposal also contradicts the United States' preference for addressing international trade issues in multilateral, rather than bilateral, fora. In addressing international telecommunications issues, the FCC, too, has recognized the importance of multilateral efforts. The Commission's ECO-Sat test, which would deny the provision of services from the United States to other countries on the basis of a bilateral reciprocity inquiry, would undermine the United States' efforts in the WTO and other multilateral arenas.

C. The Proposed Reciprocity Standard Would Violate The Spirit Of Most Favored Nation Obligations And National Treatment Outlined In GATS

Although the United States is not yet obliged to adhere to MFN or National Treatment obligations in the case of satellite communications services pending final agreement in the NGBT,[41] as a matter of maintaining consistency with the United States' support for such obligations, the FCC should avoid violating the spirit of MFN and National Treatment.

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[40] *See Telecom Markets*, p. 292/16 (May 23, 1996).

[41] The United States *has* undertaken MFN and National Treatment obligations in the case of those telecommunications services included in the U.S. Schedule to the General Agreement on Trade in Services (GATS) of 1994. However, the services included in the schedule do not include basic fixed or mobile services, whether provided terrestrially or via satellite. However, the United States in its Draft Offer submitted to the NGBT on April, 30 1996 proposed to remove most limitations on market access and all limitations on national treatment as to basic services "supplied over public telecommunications transport networks using any network technology." *Conditional Offer on Basic Telecommunications (Revision)*, Negotiating Group on Basic

Application of the ECO-Sat test would mark a step backward in this regard. Imposing reciprocity on non-U.S.-licensed satellite services would not only undermine the United States' strong stance on open market access, but possibly encourage other countries to follow suit and adopt reciprocity standards of their own — thereby inhibiting the development of the many public interest benefits of global satellite services such as MSS.

The route-by-route formulation of the ECO-Sat test would contradict the principle of MFN because the Commission, acting on behalf of the United States, would accord to countries that passed the test more favorable treatment than that provided to countries that failed to satisfy the ECO-Sat requirements. Furthermore, the ECO-Sat test, as applied in either a route-by-route or "critical mass" form, also would violate the principle of National Treatment by treating non-U.S.-licensed space stations in a less favorable manner than U.S.-licensed satellites. The Commission would subject non-U.S.-licensed satellites to a requirement that it does not apply to U.S.-licensed satellites providing similar services.

V. THE GLOBAL NATURE OF MSS RENDERS APPLICATION OF ANY ECO-SAT TEST TO MSS IMPRACTICAL

As discussed above, there are serious legal and policy questions concerning the Commission's ability to apply an ECO-Sat test to satellite services generally. Those questions notwithstanding, however, the global nature of MSS in any case renders impractical the Commission's attempt to apply an ECO-Sat test to MSS specifically.

Telecommunications, World Trade Organization (April 30, 1996) (Communication from the United States delegation).

A. The Commission Correctly Recognizes The Failings Of ECO-Sat's Route-By-Route Approach As Applied To MSS

In the Notice, the Commission proposes a modified ECO-Sat test for MSS that would "evaluat[e] . . . effective competitive opportunities for MSS providers on a global or regional basis."[42] Specifically, the Commission proposes to replace the ECO-Sat route-by-route approach with a "critical mass" approach. Implicit in this proposal is a determination by the Commission that the route-by-route approach is inappropriate for MSS

This determination is correct. MSS systems are designed to be global in nature, with the technical ability to provide service to all countries throughout the world. ICO, for example, envisions operating in every country for which it can obtain the requisite authorization. Thus, ICO could conceivably be operating in all of the more than 200 countries in the world. It simply would be impractical to require a non-U.S.-licensed MSS operator to make the requisite route-by-route showing for such a large number of countries.

To be sure, the Commission has proposed compiling a list of countries in which a U.S.-licensed operator is permitted to provide satellite services. This list would establish a record of countries that are presumed to be free of *de jure* restrictions on U.S.-licensed satellite operations and "open" to U.S. competition and thus would constitute *prima facie* evidence that no *de jure* restrictions exist with respect to the countries on the list.[43] This list would be based, however, on reports by U.S.-licensed MSS systems reflecting those countries where they are permitted to provide service. As a result, the breadth of the list will be a direct function of the pace at which U.S.-licensed MSS operators pursue opportunities abroad To the extent that ICO's system

[42] NPRM at ¶ 47.

[43] *Id.* at ¶ 39.

develops faster than those of the U.S.-licensed MSS operators, however, ICO's service providers may not be able to rely on many countries appearing on the list.

Presumably, the Commission would allow non-U.S.-licensed MSS operators to make an alternative showing regarding the competitive opportunities in other countries if those countries were not on the *prima facie* list. In addition to the administrative burden such a showing would entail, however, ICO may find it difficult, if not impossible, to demonstrate that many countries provide competitive opportunities to U.S. companies because those countries have no regulatory scheme for MSS yet in place. ICO's research shows, for example, that South Africa is restructuring its entire telecommunications regulatory scheme. While South Africa has published white papers that examine the issue of competition in all sectors of the industry, including satellite services, and these papers favor a transition to a competitive market for telecommunications services, there are to date no specific satellite regulations or policies in place.

Similarly, in Brazil there are no formal laws or regulations in place that specifically address licensing of MSS systems. ICO's understanding, however, is that while Telebras, Brazil's monopoly public telecommunications operator ("PTO") continues to have a monopoly on earth station operation in the country, the Brazilian government informally has encouraged Telebras to provide a gateway for all of the U.S.-licensed MSS operators.[44] Thus, although as a practical matter it would appear that competitive opportunities for U.S.-licensed MSS operators exist in Brazil, it is not clear how a non-U.S.-licensed MSS operator would prove as much.

[44] *See* Exhibit A.

South Africa and Brazil are but two of a large number of countries that have yet to adopt a regulatory scheme for MSS. Unless the Commission accepts the absence of a regulatory scheme encompassing MSS as proof that no *de jure* restrictions exist, ICO may be effectively precluded from making the requisite showing under the ECO-Sat test, even for countries where in practice, national markets will be open to competition for the provision of MSS services.

Given these problems with respect to a route-by-route test for MSS, the Commission correctly recognizes that applying the standard ECO-Sat test to MSS is completely unworkable. As discussed below, however, the Commission's alternative to the route-by-route ECO-Sat test also is unworkable.

B. The Proposed "Critical Mass" Test Also Is An Unworkable and Inappropriate Test

As an alternative to its ECO-Sat route-by-route analysis, the Commission proposes with respect to MSS to require that a "critical mass" of foreign markets be open to U.S. satellite operators before a non-U.S.-licensed MSS system could provide *any* service in the United States."[45] This "critical mass" concept has a number of problems that render it entirely unworkable for MSS.

First, the Commission does not define "critical mass." Indeed, the Commission specifically asks commenters to propose a definition of the term.[46] To the best of ICO's knowledge the term "critical mass" has no universally recognized definition in the satellite industry, much less in the communications field generally.

[45] NPRM at ¶ 47 (emphasis in original).

[46] *See id.*

Presumably, the Commission's use of the term is based in part on its use by the USTR in the course of the NGBT negotiations. There, the USTR took the position that the United States would not enter into an agreement unless there was a "critical mass" of "high quality" offers of market access tabled by other countries. On April 30, 1996, the USTR announced that no agreement had been reached by the NGBT because such a "critical mass" of offers had not been tabled.[47] At no point, however, has the USTR actually quantified what it means by critical mass.[48] This is undoubtedly because, in a trade negotiation context such as the NGBT, ambiguity can operate in a party's favor by providing it flexibility

Such ambiguity, however, would be entirely inappropriate in the context of a licensing procedure. Clearly, the Commission would have to precisely define the term "critical mass." The fact that the Commission has not proposed any definition of the term in the NPRM, however, makes it difficult for commenters to discuss meaningfully a "critical mass" test. Thus, ICO can only speculate on a number of possible definitions and their possible implications.

ICO assumes, based on the Commission's language in the NPRM, that the Commission intends to define "critical mass" in terms of countries.[49] This raises another problem, which the Commission itself has recognized in rejecting a "critical mass" test for non-MSS satellite

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[47] USTR News Release, Statement of Ambassador Charlene Barshefsky, *Basic Telecom Negotiations*, April 30, 1996.

[48] The USTR has stated what does *not* constitute critical mass. In its April 30 press release, the USTR noted that because "over 40% of world telecom revenues and over 34% of global international traffic" were not covered by acceptable offers, no agreement had been reached. *Id.*

[49] The Commission states that it "could require that some 'critical mass' *of relevant countries* permit competition from U.S. satellites . . . ." NPRM at ¶ 31 (emphasis added). It is possible, of course, to define the term "critical mass" on the basis of any number of other factors, such as land surface, population, households, telecommunications end-users, or — as the USTR has done — on the basis of telecommunications revenues or traffic.

There is a very real possibility that non-U.S.-licensed MSS operators will, in fact, fail the "critical mass" test, however it is defined, as a result of circumstances beyond their control. As explained above, it is likely that many of the countries that non-U.S.-licensed MSS operators plan to serve will not be on the Commission's list of *prima facie* open countries.[53] Non-U.S.-licensed MSS operators would therefore have to prove, by other means, that the relevant countries provide open access. As also explained above, this proof may, in many instances, be impossible to obtain because so many countries do not yet have a regulatory scheme in place with respect to MSS. Under the proposed "critical mass" test, if a non-U.S.-licensed MSS operator cannot prove access to even one country that constitutes part of the "critical mass," as defined by the Commission, that operator will be denied access to the U.S. even though it is able to prove open access with respect to every other "critical mass" country. The Commission fails to explain why such a draconian result is acceptable for MSS when it is unacceptable for other satellite services.

Another potential problem with the "critical mass" test — depending on how "critical mass" is defined —is one of changed circumstances. It is entirely unclear from the Notice whether the "critical mass" test will be applied once with respect to a set of countries — *i.e.*, a snapshot in time — or whether the test will be reapplied whenever a non-U.S.-licensed MSS operator seeks to provide service to another country or a country alters its regulatory scheme with respect to MSS. If the test is continually reapplied, then a non-U.S.-licensed MSS operator could pass the test, start providing service and, some time later, fail the test. Under the "all or nothing" aspect of the "critical mass" test, that operator presumably could be forced to stop serving the

[53] We assume, although it is not clear from the NPRM, that the Commission intends to incorporate the *de jure/de facto* requirements into the "critical mass" test.

services.[50] Specifically, because any such "critical mass" test would presumably look at a subset of countries, such an approach "raises difficult questions about exactly which countries are relevant."[51]

The subset of countries could be defined in any number of ways. For example, the Commission could define "critical mass" to be simply a percentage of the total number of countries that an operator intends to serve. Alternatively, the Commission could state that the ten largest countries served by an operator comprise "critical mass." The Commission could also simply identify a certain number of countries as comprising "critical mass" for all operators, whether or not any individual operator intends to serve those countries. How the Commission would determine the relevance of some countries, but not others, is unclear. Significantly, a "critical mass" test, regardless of how it is defined, would be an entirely arbitrary selection of countries.

Yet another problem with the "critical mass" test is that it is unduly harsh in its result because it will preclude an MSS operator from providing service from the U.S. to any country if that operator fails the test. The Commission itself recognizes that this amounts to regulatory overkill, stating that "the 'all or nothing' characteristics of such an approach might result in less competition on routes that are open to U.S. satellites, based on the fact that other markets are closed."[52] To the extent that a non-U.S.-licensed MSS operator fails the test, the Commission would, in effect, punish some countries for the "sins" of others.

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[50] *See id.* ("[W]e tentatively conclude that the two-pronged framework better fits the majority of satellite services. . . .").

[51] *Id.*

[52] *Id.*

U.S. after it had been doing so for some time. Such a result would, at a minimum, cause massive consumer confusion and could be fatal to an MSS operator's business. To avoid this disastrous result, non-U.S.-licensed MSS operators likely would cease from expanding service into other countries absent certainty about the openness of those countries, or alternatively, would refrain from entering the MSS business at all. Under either of these scenarios, competition, and hence U.S. telecommunications users, would suffer.

VI. THE ECO-SAT TEST FOR MSS ARBITRARILY DISCRIMINATES AMONG SIMILARLY SITUATED COMPANIES

In addition to being impractical for the reasons discussed above, an ECO-Sat test for MSS is further flawed in that it arbitrarily discriminates among similarly situated MSS operators. The Commission has proposed that an ECO-Sat test apply only to entities seeking to utilize non-U.S.-licensed space stations for purposes of providing MSS. Of the announced global MSS operators, ICO now is the only entity whose space segment is not licensed by the United States. Therefore, the Commission's proposed ECO-Sat test for MSS currently would apply only to ICO. In contrast, the test would not apply to the three other MSS operators in existence today — Globalstar, Iridium and Odyssey — because they all have secured space station licenses from the United States. Only ICO, then, would be forced to make the evidentiary showing required by the ECO-Sat test. Regardless of whether ICO ultimately is able to make this showing and thereby "pass" the test, it will have been placed at a competitive disadvantage vis-à-vis its U.S.-licensed competitors because it will have taken time and expended resources that they did not.

There is no distinction between ICO and the U.S.-licensed MSS operators, however, that would provide the Commission with a logical justification for applying such a protectionist

measure. To be sure, unlike Globalstar, Iridium and Odyssey, ICO's MSS system will not utilize a U.S.-licensed space station. That is where the difference among existing global MSS operators ends, however. Three of the four operators are otherwise very similar in terms of their extensive non-U.S. investors and service providers.[54]

Given the global nature of MSS, ICO, Iridium and Globalstar each face significant challenges securing authorizations and service agreements in countries throughout the world. In addition, these operators require huge capital investment in order to build and operate their systems. Not surprisingly, therefore, all three of these MSS operators tend to have numerous foreign investors, as well as numerous affiliated foreign service providers. Many of these investors and service providers independently offer telecommunications services in their home countries.

A look at the existing MSS operators demonstrates how similar they are. Globalstar and Iridium — like ICO — have numerous foreign investors representing scores of countries.[55] Iridium's publication *Iridium Today* and Globalstar's *The Globalstar Communique* contain regular updates on these investors, strategic partners and service providers.

For example, major investors in Iridium include, but are not limited to, Korea Mobile Telecom, Nippon Iridium Corporation of Japan, STET of Italy, Thai Satellite Telecommunications Co., Ltd. and Vebacom of Germany

[54] Odyssey apparently has not expanded its international presence beyond its initial two investors (TRW Inc. and Teleglobe Inc.).

[55] Press announcements by both Globalstar and Iridium report their success in building global alliances. Globalstar has said that its strategic partners and local and regional service providers have agreed to act as Globalstar service providers in more than 90 countries. *See* Communications Daily, (June 27, 1996) at 7. Iridium announced in February that "an Iridium investor company now is responsible for implementing service in every country of the world, in partnership with local wireless and other service providers." *See* PR Newswire, "*Iridium, Inc. raises additional US $315 million*," Feb. 20, 1996; "*Iridium Investors Ante Up Additional $315 Million*," Feb. 26, 1996.

- Korea Mobile Telecom provides cellular and paging services in the Republic of Korea and was created by Korea Telecom, the country's PTO.

- Nippon Iridium Corporation is a consortium formed by DDI Corporation, Japan's leading independent telecommunications company providing cellular and long distance telephone services; Kyocera Corporation, an equipment manufacturer; and numerous cellular providers, including Chugoku Cellular Telephone Co., Kansai Cellular Telephone Company, Hokkaido Cellular Telephone Company, Hokuriku Cellular Telephone and Tohoku Cellular Telephone Company, among others.

- STET is a telecommunications and electronics holding company with more than 100 controlled and affiliated companies, including Telecom Italia, Italy's PTO and one of the world's top telecommunications companies. STET also provides telecommunications services in Argentina through its joint venture with, among others, France Telecom, the incumbent PTO in France.

- Vebacom is jointly owned by Veba AG of Germany (55%) and Cable & Wireless of the U.K. (45%). Veba AG is the fourth largest corporation in Germany with interests in mobile communications, satellite communications, network management, cable TV and paging services.

- Cable & Wireless, in addition to being a major fixed and wireless service provider in the U.K., has telecommunication operations in more than 50 countries worldwide.

Globalstar's strategic partners also have significant market positions in both home markets and throughout the world. Globalstar's international alliances include, but are not limited to, Alcatel of France, DACOM of Korea, France Telecom, and Vodafone of the U.K.

- Alcatel is the world's largest manufacturer of telecommunications equipment, with operations in 32 countries.

- DACOM is a leading South Korean telecommunications company that provides a broad range of telecommunications services, including international telephony.

- France Telecom is the world's fourth largest telecommunications operator with operations in over 19 countries. France Telecom and Alcatel have formed a joint venture, T l'communication par Satellites Mobiles (TESAM), to provide Globalstar services in over 20 countries.

- The Vodafone Group is one of the largest providers of mobile telecommunications services in the world, with 1.4 million cellular subscribers worldwide.

In addition to the investors mentioned above, both Iridium and Globalstar have gained the support of major local companies in countries that have traditionally closed telecommunications markets. In China, Iridium China Ltd., which is owned by China Aerospace, plans to build a gateway near Beijing to provide Iridium service to the country's 1.2 billion people. In the Middle East, two of Saudi Arabia's largest companies joined together to form Iridium Middle East Corporation and one of those companies also has formed Iridium Africa Corporation. Mawarid Overseas Company has operations in construction, municipal services and telecommunications in Saudi Arabia and throughout the Middle East and the Saudi Binladin Group has operations in construction and telecommunications. Globalstar has also been successful in "difficult" markets. Hasan Associates Ltd of Pakistan, a major telecommunications provider and partial owner of the country's largest cellular operator, has formed a joint venture with Hyundai/DACOM to provide Globalstar services in Pakistan.

Exhibit A contains a comparison, compiled from publicly available sources, of the investor and service provider base for ICO, Iridium, Globalstar and Odyssey in large markets (defined as countries with a gross domestic product ("GDP") exceeding $60 billion). The summary table shows those countries in which an MSS operator has: (1) an authorization to operate; (2) an investor or service provider who currently provides basic or mobile telecommunications services; or (3) an investor or service provider that has an equity interest of more than 20% in a basic or mobile service provider. Individual tables for each of the MSS operators describe the nature of the MSS operators' alliance in each country. These tables confirm the high degree of success of Iridium, Globalstar and ICO in obtaining investors and service provider in the world's major markets and the similarity of their investor bases.

Given the similarities among ICO and MSS operators licensed by the United States in terms of the broad international character of their investor and service provider base, the application of an ECO-Sat test that distinguishes among them solely on the basis of whether their space station was licensed by the United States is entirely illogical. As noted above, the results notwithstanding, the mere application of an ECO-Sat test would provide three companies with a competitive advantage over a nearly identical company. For the Commission to take such action in the name of "enhancing" competition for MSS would constitute arbitrary and capricious decision making.

VII. APPLICATION OF AN ECO-SAT TEST TO GLOBAL MSS SYSTEMS WILL NOT, AS THE COMMISSION INTENDS, PROMOTE COMPETITION

In proposing its ECO-Sat test, the Commission hopes to increase competition for satellite services by "facilitat[ing] much greater access to non-U.S. satellites," and "encourag[ing] foreign governments to open their satellite communications markets."[56] The Commission's goal of increased competition is a proper one. As the Commission correctly notes, "[f]air, vigorous competition among multiple providers leads to lower prices, better service, and more innovative service offerings for satellite communications users in the United States."[57] Application of an ECO-Sat test to MSS operators, however, will not serve this goal. Instead, application of such a test likely will reduce competition for MSS, contrary to the public interest.

[56] NPRM at ¶1.

[57] *Id.* at ¶ 8.

A. Application Of The ECO-Sat Test Likely Will Prevent Non-U.S.-licensed MSS Operators From Competing With U.S.-licensed Operators

As discussed above, the "critical mass" test is seriously flawed and, as a result, non-U.S.-licensed MSS operators such as ICO likely would fail the test The result of this failure would be to ensure that U.S. MSS customers — at least for some time —are served by only U.S.-licensed MSS operators and not by non-U.S.-licensed operators In other words, the Commission will have achieved the exact opposite result that it intended to achieve in this proceeding. Instead of "facilitating much greater access to non-U.S. satellites," the Commission will have severely limited, if not precluded altogether, such access.

Clearly, this loss of competition from non-U.S.-licensed MSS operators will operate to the detriment of American consumers, who will not enjoy the benefits of choosing among a full range of service options in order to acquire the full benefits of competition. Additionally, limiting or precluding non-U.S.-licensed MSS operators from serving the U.S. could operate to the detriment of the U.S. economy. Non-U.S.-licensed MSS operators are likely to have U.S. business partners. Hughes and Comsat, both of which are U.S companies, have substantial investments in ICO and can serve as ICO distributors in the United States. If the "critical mass" test prevents ICO from serving the United States, then Hughes and Comsat would be foreclosed from a significant business opportunity.

B. Application Of The ECO-Sat Test Will Not Affect The Opening Of Foreign Markets

Just as application of the ECO-Sat test will not serve to increase American consumers' access to non-U.S.-licensed satellites, it also will not serve to open foreign markets to competition from U.S.-licensed MSS operators, for two reasons. First, the trend in most foreign

countries already is toward open access. As the recent history of international telecommunications has shown, the United States' most successful strategy for encouraging the liberalization of foreign markets has been to promote change by example. As the innovative leader in telecommunications regulation, the United States has successfully demonstrated to the world the benefits of competition in communications industries. An examination of the evolving international telecommunications regulatory environment reveals the remarkable extent to which the United States has been able to encourage the development of pro-competitive regulation around the world. In particular, as demonstrated in Exhibit B, many countries have shown considerable progress in allowing competition for mobile services in their markets. This trend holds even in those markets that remain closed to competition for wireline local, long distance, and international services. For example, in the Middle East and Africa, where wireline markets are still dominated by monopoly providers, regulators have begun to experiment with competition in the cellular and paging markets. As for the Americas, Asia, and Europe, national markets in numerous countries are already open to mobile service competition.

Because ICO and other MSS operators will be providing services more analogous to mobile services than to wireline service, regulators are likely to use their existing regulatory approaches for mobile services as the template for regulating MSS. As a result, the countries of the world, following the United States' example, already have an established framework that can be used to open MSS markets. Most countries, therefore, are likely to adopt a pro-competitive licensing scheme for MSS, regardless of whether the U.S. utilizes an ECO-Sat test. This is especially true of the many countries that already have a pro-competitive scheme for licensing

cellular operations. Because MSS is primarily a cellular extension service, there is every reason to believe that these countries will similarly desire a competitive MSS market.

To be sure, there are countries that still place restrictions on access to their telecommunications markets, for any number of reasons. Many of these countries will change their views when they believe it to be in their best interests, but not simply because the United States adopts an ECO-Sat test.

Moreover, the ECO-Sat test is based on the assumption that foreign countries have (and recognize) an interest in helping non-U.S.-licensed MSS operators to access the lucrative U.S. market, and therefore will have an incentive to open access to their own national markets. That assumption may not be valid, at least with respect to those foreign countries that are not, and are unlikely to be, the home countries of MSS operators (*i.e.* virtually all foreign countries except the U.K.).

As noted above, many countries have yet to even begin licensing MSS operators. Even if every country had an MSS licensing scheme in place, the enormous capital investment required to build and operate an MSS system would limit the number of entities that are able to do so. Those countries that are not the home country to an MSS operator presumably will have no clear direct interest in the level of access to the U.S. accorded non-U.S.-licensed MSS operators. As a result, the ECO-Sat test will not provide such countries with sufficient incentive to ensure that U.S.-licensed MSS operators have access to the U.S. market.

The Commission's experience with international simple resale ("ISR") illustrates the problem with applying a reciprocal test in a situation where the foreign country may have no tie to the entity seeking access to the U.S. In 1991, the Commission adopted a reciprocal test for

ISR, which allows companies to offer ISR between the U.S. and a foreign country only if the foreign country is deemed to provide "equivalent resale opportunities."[58] The companies that have sought authority to provide ISR, however, have in many instances not been a national of the country they seek to serve. Indeed, in many cases, the applicant has been a U.S. company.

To date, only three countries — the United Kingdom, Sweden and Canada — have been found by the Commission to provide equivalent ISR opportunities. Clearly, the test has been less than effective in opening foreign markets to access by ISR providers.[59] Because the ECO-Sat test suffers from the same flaw as the ISR equivalency test in that there will often be no tie between the applicant seeking a U.S. authorization and the foreign country whose reciprocal opportunities are being examined, the ECO-Sat test will be equally ineffective in opening foreign markets to access by MSS operators.

C. Application Of The ECO-Sat Test Could Restrict U.S.-licensed MSS Operators' Access To Foreign Markets

Non-U.S.-licensed MSS operators may not be the only entities harmed by application of the ECO-Sat test. To the contrary, application of the test may also harm U.S.-licensed MSS operators. Other countries may view the FCC's proposal to apply the ECO-Sat test as protectionist in nature and, in response, adopt measures designed to restrict access to their countries by U.S.-licensed MSS operators. It is entirely possible that those measures would be similar to the ECO-Sat test, and have the same chilling effects on the MSS industry as the FCC's own proposal. For example, a foreign country's ECO-Sat test might find that the United States is not an open market specifically because the FCC adopted the ECO-Sat test. In such a case, the

[58] *See Regulation of International Accounting Rates*, Phase II First Report and Order, 7 FCC Rcd. 559 (1991).

[59] As noted *supra*, note 39, the UK recently abandoned its efforts to award ISR license only on an equivalent basis, seeking instead to rely on increasingly open markets and regulatory safeguards.

ECO-Sat test again will have produced the exact opposite result from that intended by the Commission. Instead of increasing access to other countries, the ECO-Sat test will have decreased that access.

VIII. THE LICENSING SCHEME FOR ALL GLOBAL MSS SYSTEMS MUST ENSURE REGULATORY PARITY IN ORDER TO SUPPORT A FULLY COMPETITIVE INTERNATIONAL MARKET

In order to promote the development of global MSS, national regulators must take into account the unique international nature of these services. Because the success of all global MSS systems is dependent upon gaining market access around the world, establishing regulatory parity for MSS regulators will require multilateral, rather than unilateral, efforts targeted toward the creation of compatible, open and nondiscriminatory regulatory schemes worldwide. It is not practical or realistic for a single national regulator such as the FCC, however influential, to attempt to achieve the opening of MSS markets around the world through a unilateral approval process based on a market access reciprocity test.

The Commission should therefore reject the proposed ECO-Sat test for MSS and adopt the alternative approach proposed below. Unlike the ECO-Sat test, this alternative multilateral approach will promote a truly competitive market for MSS.

A. The Commission Should Encourage Other Notifying Administrations To Place A "No Special Concessions" Condition On Their MSS Operators

The FCC can best achieve its pro-competition goal by encouraging the national regulatory administrations of "home" countries for global MSS space segment operators seeking to serve the United States (*i.e.*, the ITU notifying administrations for such operators' MSS systems) to apply a "no special concessions" condition to their authorized MSS operators. The

substance of the condition should closely resemble the "no special concessions" condition already implemented by the FCC for U.S.-licensed operators,[60] though its form necessarily would vary from one national regulatory environment to another. This approach would ensure open market access and fair competition in the international MSS market without the grave disadvantages associated with the FCC's proposed "critical mass" test.

The Commission should pursue this goal in various international fora, including the WTO (NGBT) negotiations and the ITU Policy Forum. The WTO negotiations, in particular, provide an excellent opportunity for the United States to seek a binding international agreement on this approach to securing open market access for MSS operators. In the interim, however, substantial progress can be made by persuading national regulatory administrations to act prior to such an agreement.

The "no special concessions" condition that should be applied multilaterally should be broader than that currently imposed by the FCC. The FCC's "no special concessions" condition only prohibits U.S.-licensed satellite operators from enjoying special concessions in other countries that are denied to other U.S.-licensed MSS operators. In the NPRM, the Commission solicits comment on whether it should expand this condition "to prohibit [the licensee] from acquiring or enjoying special arrangements that unfairly disadvantage *any* competing satellite operator, whether licensed by the U.S. or by another administration, for reasons other than spectrum scarcity."[61] ICO urges the Commission to expand the condition in this manner *and* persuade other national regulators to apply the same expanded restriction to MSS operators

[60] *See* 47 C.F.R. § 25.143 (adopted in *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Band*, Memorandum Opinion and Order, CC Docket No. 92-166 (Feb. 15, 1996)).

[61] NPRM at ¶ 43 (emphasis in original).

subject to their jurisdiction. If implemented successfully multilaterally, this approach would establish regulatory parity for all MSS operators, regardless of their particular country of licensing/notification.

This multilateral "no special concessions" approach makes sense for several reasons. Most important, unlike the ECO-Sat test, this approach will serve the Commission's goal of "enhancing competition in the global market for satellite services." It will do so in two ways. First, it will help to ensure that U.S.-licensed MSS operators are not discriminated against in other countries. Widespread adoption of the "no special concessions" condition will prohibit non-U.S.-licensed MSS operators from blocking U.S.-licensed satellite access to international markets. Thus, ICO's proposed approach addresses the Commission's concern over the hypothetical possibility that a non-U.S.-licensed satellite "will have a competitive advantage over its U.S. counterparts on *all* routes because it will be able to offer its customers a wider range of communications capabilities."[62]

Second, ICO's proposal will help to ensure that no MSS operator — U.S.-licensed or otherwise — is discriminated against in other countries. If implemented multilaterally, the "no special concessions" prohibition would protect *all* MSS operators from the possibility of competitors gaining exclusive access to certain markets. By leveling the playing field in this manner, ICO's proposal would strengthen the ability of all MSS operators to serve the United States.

[62] *Id.* at ¶ 11 (emphasis in original). The Commission's concern may in any event be unfounded. As demonstrated in Section VI and Exhibit A, the U.S.-licensed MSS operators likely will obtain access to most major countries given their strategic relationships with entities in those countries

Additionally, unlike the ECO-Sat test, ICO's proposal does not arbitrarily discriminate among similarly situated entities. As demonstrated above, all of the existing MSS operators have a presence in numerous foreign countries via their foreign investors and service providers, many of whom are operators of terrestrial telecommunications networks and services – fixed, mobile or both. Given the international character of *all* of the MSS operators, including the U.S.-licensed operators, it makes no sense to accord them different regulatory treatment based solely on the country in which they have chosen to license their space stations, as the Commission would do with its proposed ECO-Sat test.

ICO's multilateral approach is also consistent with the United States' long-established and successful practice of leading international telecommunications regulatory developments by example. Whereas application of the ECO-Sat test would almost certainly be viewed in some countries as an attempt by the FCC to exert supranational jurisdiction over non-U.S.-licensed satellites, notifying administrations are likely to be more receptive to an invitation voluntarily to adopt a "no special concessions" condition on MSS operators. ICO is confident that a multilateral effort to make the "no special concessions" condition applicable internationally would be successful. Other administrations are likely to agree that it is in their own sovereign interests to adopt pro-competitive measures such as a "no special concessions" condition, particularly when there is a strong international trend to open the type of market in question, as there is here. As noted above, MSS, as an extension of cellular services, is likely to be viewed by national regulators as part of the highly competitive mobile services market.

Finally, global MSS operations are not expected to be introduced until 1998 at the earliest, giving the United States and other countries time to develop regulatory parity

internationally for global MSS operators through intensive dialogue between national regulators and policymakers. The Commission need not adopt a quick-fix reciprocity test to address concerns regarding global MSS market access. A measured and patient multilateral approach should produce regulatory parity without risking the many disadvantages of the ECO-Sat "critical mass" test. The latter approach has the added benefit of placing the burden on operators, rather than regulators, to police violations of the restriction.[63] If national regulators adopt a "no special concession" condition, there will be no need for further Commission action because its objectives as stated in the NPRM will have been met.

B. The FCC Can Later Fashion Rules For CMRS Providers To Ensure A Fair, Competitive MSS Market

It is possible that some notifying administrations may lag in accepting or implementing a "no special concessions" condition, at least during an interim period. Moreover, some global MSS operators' methods of operation may make it difficult for their competitors to determine whether the "no special concessions" requirement is satisfied. For example, a competitor of an MSS operator that sells airtime minutes in bulk to cellular operators that operate in multiple countries may not be able to determine whether or how the MSS operator may be enjoying special concessions.

In order to address these cases, if they arise, the FCC may wish to consider fashioning rules directed specifically at "downstream" entities. In the United States such entities likely will provide services to consumers on a CMRS basis and may require FCC licenses to offer such

[63] Enforcement of these conditions could take place in a number of potential fora. For example, complaints could be handled by individual notifying administrations pursuant to their own procedures. Alternatively, the WTO or other multilateral institutions could arbitrate complaints through their dispute resolution processes, *e.g.*, the WTO Dispute Settlement Understanding. ICO is investigating the possibilities for enforcement, and encourages the FCC to consider other possible mechanisms for implementing the "no special concessions" approach on a multilateral basis.